Supreme Court, U.S.
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No. 96-965

In The

Supreme Court of the United States

October Term, 1996

SHEILA HOPPER, ex rel.,
UNITED STATES OF AMERICA,

Petitioner,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT, WILLIAM ANTON, LEONARD BRITTON, PAUL CARR, PHILLIP CALLISON, JAMES ESTERLE, DEANNE NEIMAN, BENITA CHAUM, CAROL ALBRIGHT, and JACKIE THOMPSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

Bonifacio Bonny Garcia
(*Counsel of Record for Respondents*)
Rajeev M. Talwani
Barbosa Garcia & Barnes
500 Citadel Drive
Suite 390
Los Angeles, California 90040
(213) 889-6600
Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Did the Ninth Circuit err in finding that there was no evidence that Respondents made a false claim under the False Claims Act?

2. Did the Ninth Circuit err in finding that the "whistleblower" provision of the False Claims Act does not extend to Petitioner because her acts had no nexus to the False Claims Act?

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BRIEF IN OPPOSITION

Respondents Los Angeles Unified School District, William Anton, Leonard Britton, Paul Carr, Phillip Callison, James Esterle, Deanne Neiman, Benita Chaum, Carol Albright, and Jacklyn Thompson respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Ninth Circuit Court of Appeals' decision in this case.

STATEMENT OF THE CASE

Petitioner Sheila Hopper is a special education teacher employed by Respondent Los Angeles Unified School District (the "School District"), one of the largest public school districts in the United States.[1] Between 1989 and 1991, Petitioner filed several administrative complaints with the California State Department of Education ("CDE") and the United States Department of Education Office of Civil Rights ("OCR") to compel the School District's compliance with certain state and federal special education laws and regulations. (SER tab 1, ER pp. 83-115).[2] The CDE and OCR found some of Petitioner's complaints to have merit (SER tab 12) and the School District took the corrective actions necessary to return to

[1] The other Respondents are School District administrators.

[2] Citations to the record below are designated herein as follows: Citations to "ER" are to Petitioner's Excerpts of Record before the Ninth Circuit and are to the page number. Citations to "SER" are to Respondents' Supplemental Excerpts of Record before the Ninth Circuit and are to tab number. Citations to "App." are to the Appendix of the Petition for Certiorari.

compliance. (ER pp. 108, 293, 305-06). None of these complaints nor any of the findings by the CDE or OCR had anything to do with fraud or false claims for federal funds. (SER tab 1, ER pp. 83-115).

Beginning in March 1990, Respondent Jacklyn Thompson ("Thompson"), a School District elementary school principal, received several complaints about Petitioner, including allegations of child abuse, impermissible corporal punishment, and the improper alteration of a child's school schedule.

Thompson investigated the complaints, determined that disciplinary action against Petitioner was required and recommended to her superiors that Petitioner be given a written reprimand. (SER tabs 15 and 16). Thompson's superiors at the School District disagreed and dictated that Petitioner be suspended for fifteen days without pay. (SER tabs 15 and 16).

In April 1993, Petitioner filed this action alleging that her administrative complaints demonstrated that the School District, as well as Thompson and other School District administrators, had fraudulently obtained federal special education funds under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* ("IDEA") in violation of the False Claims Act, 31 U.S.C. § 3729 *et seq.* ("FCA"). Appellant also alleged a claim for retaliation under 31 U.S.C. § 3730(h), the "whistle blower" provision of the FCA. (ER pp. 147-156).

A. Legislative Scheme of IDEA.

The express legislative purpose of IDEA is to provide states and localities with financial assistance for the provision of educational programs and related services to students with disabilities. 20 U.S.C. § 1400(c). Under IDEA school districts are entitled to supplementary special education funding from the federal government. 20 U.S.C. § 1400 *et seq.* The District's annual special education budget exceeds $537 million and serves almost 64,000 disabled children every year. (SER tabs 9, 11 and ER p. 300). Of this amount, only 0.05% comes from the federal government. *Id.* The School District allocates $150 million from its general fund to ensure that its special education programs and services are operated in compliance with all applicable laws. (SER tabs 9 and 11, ER p. 300).

The federal government annually grants IDEA funding to each state. 20 U.S.C. §§ 1411(a)(1) and 1413. Each school district then applies to the state for its share of IDEA funding. 20 U.S.C. § 1414(a). The California Department of Education administers California's share of IDEA funds as well as distribution of the state's own special education funds. It annually allocates 75% of these funds to California school districts based on formulae related to the number of children enrolled in their special education programs during the prior year. 20 U.S.C. § 1411(d). Every school district provides this information to CDE four times a year, in a J-50 form and, at the end of the school year, in a J-380 form. Neither form contains any

representation or certification concerning the School District's compliance with state and federal special education mandates. (SER tabs 9 and 11, ER pp. 484-87).

Under IDEA, each state is responsible for ensuring compliance with special education mandates. 20 U.S.C. §§ 1412 and 1414. Thus, CDE regularly monitors such compliance and, based on its own periodic review and inspection of each school district's procedures and practices, determines whether a school district's compliance is satisfactory. (SER tab 9 and ER pp. 301-02). Neither CDE nor the federal government requires school districts to certify that it has complied in the past or is currently in compliance with state and federal special education mandates as a prerequisite to the annual disbursement of IDEA funds. (SER tabs 9 and 11, ER pp. 292, 301-02).

As part of its regulatory structure, CDE requires school districts to submit a Local Plan for Special Education ("Local Plan") every three years. CDE reviews the Local Plan to insure that it meets the requirements of state and federal special education mandates. As part of the Local Plan, each school district provides a Certification of Participation, Compatibility, and Compliance Assurances ("Certification of Assurances") signed by the school district's superintendent wherein the school district certifies that it: " . . . will meet all applicable requirements of state and federal laws and regulations, including ***general*** compliance with Public Law 94-142, Section 504 of Public Law 93-112, and the provisions of

the California Education Code, Part 30. . . . " (ER pp. 54-5) (emphasis added).[3]

Because IDEA requires that every student with an eligible disability be given a free appropriate public education, if even one of the School District's 640,000 students is erroneously denied special education services, the School District would be in technical noncompliance with IDEA. The Certification of Assurances, however, refers to "general compliance," not perfect compliance.

Every three years CDE conducts a comprehensive coordinated review and inspection of each school district's compliance with the state and federal special education mandates. If items of noncompliance are identified, the school district presents a plan for remediation of such items and CDE monitors the school district to ensure that the remediation actually takes place. (SER tab 9 and ER p. 293).

CDE conducted compliance reviews of the School District in 1987, 1990 and 1993. In each case all items of noncompliance were remedied to the satisfaction of the CDE and the School District was determined to be in compliance with all special education mandates. (SER tab 9 and ER pp. 293, 299-300).

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[3] Public Law 94-142 is the predecessor of, and was superseded by, the passage of IDEA. Individuals with Disabilities Act, Pub.L. 94-142, § 8, 89 Stat. 796 (1975). California Education Code, Part 30, is found at Cal. Educ. Code § 56333 (West 1996).

B. Procedural History.

Petitioner filed suit on or about April 28, 1993. (ER p. 74). In September 1994 the School District moved for summary judgment on Petitioner's FCA and retaliation claims. (ER pp. 218-23). The district court granted the School District's motion for summary judgment on the FCA claim but denied its motion for summary judgment on the retaliation claim. (App. 26-32).

Petitioner's retaliation claim came on for trial on November 8, 1994. At the close of evidence, the School District's motion for a directed verdict was denied. (SER tab 22). The jury subsequently returned a special verdict in which it found that Petitioner's administrative complaints were in furtherance of a FCA action and that Thompson, but no other administrator, had retaliated against Petitioner on account of those administrative complaints. (ER pp. 701-03). The jury awarded appellant $50,000 in compensatory damages. (App. 33-34). Respondents' motion for judgment as a matter of law was denied on January 23, 1995. (App. 37-40).

Petitioner filed a Notice of Appeal of the grant of Respondents' summary judgment motion on the FCA claim on February 17, 1995; on March 8, 1995, the School District and Thompson cross-appealed the district court's denial of their motion for judgment as a matter of law on the retaliation issue. The Ninth Circuit upheld the district court's ruling on the summary judgment motion but reversed the district court's denial of judgment as a matter of law on the retaliation issue. On September 13, 1996, Petitioner's petition for rehearing and suggestion for rehearing en banc were denied by the Ninth Circuit, with

no judge of the court requesting a vote on Petitioner's suggestion for rehearing en banc. (App. 41-42).

REASONS FOR DENYING THE WRIT

This case represents an attempt by Petitioner to: (i) broaden the scope of the FCA to cover instances of regulatory noncompliance in the absence of fraud or false claims; and (ii) broaden the "whistleblower" protections of Section 3730(h) of the FCA to protect activities that had nothing to do with an investigation of fraud. Petitioner, however, points to no conflict with this Court's precedents, no actual conflict with the decision of any other circuit, nor any other compelling basis for this Court's review.

A. The Ninth Circuit Is Not in Conflict with Any Other Circuit in Holding That the "Whistleblower" Protection of the FCA Does Not Extend to Petitioner Because She Was Not Investigating Fraud; Petitioner Cites Only *Neal v. Honeywell* for a Possible Conflict but That Case Involved a Plaintiff Who Was in Fact Investigating Fraud

Petitioner argues in support of her writ petition that the Ninth Circuit's decision in this case conflicts with other circuits in two ways. As to the retaliation count, Petitioner asserts that the Ninth Circuit's decision is in conflict with *Neal v. Honeywell, Inc.*, 33 F.3d 860 (7th Cir. 1994), which held that a plaintiff who investigated fraud was entitled to the "whistleblower" protections of Section

3730(h) even though her employer settled with the United States before plaintiff could file an FCA action.[4]

Petitioner argues that because Petitioner actually filed an FCA action, she is entitled to at least as much protection as the plaintiff in *Neal*. This asserted conflict with *Neal* is illusory, however, because the Ninth Circuit based its decision on its finding that Petitioner's "investigatory activity did not have any nexus to the FCA." *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1269 (9th Cir. 1996). Moreover, according to the Ninth Circuit, "the record quite clearly shows [Petitioner] was merely attempting to get the School District to comply with Federal and State regulations. . . . She was not investigating fraud. She was not whistleblowing as envisioned in the paradigm qui tam FCA action. [Citation omitted]." *Id.* There is nothing about this finding that contradicts the holding in *Neal* or the opinion of any other circuit.

B. The Ninth Circuit Is Not in Conflict with Any Other Circuit in Affirming Summary Judgment Where There Was No Evidence of Fraud; Petitioner Cites Only *United States v. Veneziale* for a Possible Conflict but That Case Involved an Actual Fraudulent Misrepresentation

Petitioner also argues that the Ninth Circuit's opinion upholding summary judgment on the FCA claim conflicts

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[4] The court in *Neal* concluded that the plaintiff's investigation warranted the "whistleblower" protection of the FCA because "Neal's report was not a figment of her imagination; two guilty pleas and a hefty settlement show that civil litigation [under the FCA] was a real possibility." *Neal*, 33 F.3d at 864.

with "other circuits" in general and the Third Circuit's opinion in *United States v. Veneziale*, 268 F.2d 504 (3rd Cir. 1956), in particular, because the Ninth Circuit declined to interpret "false claim" so broadly as to include mere regulatory noncompliance in the absence of any affirmative misrepresentation. (Petition for Certiorari, p. 13). However, there is nothing in *Veneziale* that could possibly be construed to conflict with the Ninth Circuit's opinion. In *Veneziale*, the Third Circuit held that a fraudulent misrepresentation which induced the government to guarantee a loan was actionable under the FCA when the government was forced to pay under its guaranty even though the wrongdoer neither sought nor obtained any transfer of funds to himself. *Veneziale*, 268 F.2d at 505-06. In the instant case, the Ninth Circuit affirmed the trial court's grant of summary judgment because of the ***absence of any*** misrepresentation by the School District. *Hopper*, 91 F.3d at 1266-67. Petitioner cites no other circuit cases that conflict with the Ninth Circuit's decision on this issue.

C. There Are No Important Federal Issues to Be Addressed by the Court in This Case and Petitioner's Assertions To the Contrary Are Wrong Because She Misinterprets: (i) the Funding Requirements of IDEA; and (ii) the Basis for the Ninth Circuit's Decision on the Promissory Fraud Question

There are no important federal issues to be addressed by the Court in this case. Petitioner's assertions to the contrary are in error because she misinterprets the funding requirements of IDEA as well as the basis for the

Ninth Circuit's decision on the promissory fraud question.

1. The Ninth Circuit correctly found that IDEA does not require certification of compliance as a prerequisite for funding and Petitioner cites no authority to the contrary.

Petitioner's contention that the Ninth Circuit erroneously concluded that IDEA does not require certification of compliance with special education laws as a prerequisite to the receipt of special education funds is simply wrong. Plaintiff cites no language in IDEA or any other law that supports her assertion that certification of *past* compliance is a prerequisite for funding.

As to her assertion that certification of *future* compliance is a prerequisite to funding, Petitioner again finds no support in IDEA. Instead, she stretches the meaning of language found in Section 1414 of IDEA, which states that a local educational unit seeking its share of federal funds apportioned to the state shall submit an application to the state educational agency, which application shall provide satisfactory assurances as to how the special education funds will be used. 20 U.S.C. § 1414(a). Section 1414(b)(2)(A) of IDEA provides that in the event that the state educational agency, after notice and a hearing, finds that a school district failed to comply with any requirement in its application, the state shall make no further payment to the local school district. 20 U.S.C. § 1414(b)(2)(A). This language in IDEA is a far cry from a requirement that a school district certify future compliance as a precondition to federal funding. Furthermore,

there is no evidence in the record that the School District failed to provide "satisfactory assurances" in accordance with Section 1414 or that the State of California or the federal government ever determined that the School District's assurances were not satisfactory.

The issue is raised by Petitioner to support her argument that instances of past School District noncompliance gives rise to an inference of promissory fraud:

> [b]y definition, a false promise of compliance in the face of pervasive, ongoing noncompliance is not a "satisfactory assurance" of compliance under the IDEA, and thereby inherently "creates eligibility that would otherwise not exist." [Citation omitted].

(Petition for Certiorari, p. 20).

Apart from misstating the requirements of IDEA, Petitioner's argument depends upon her misstatement of the record before the district court and the Ninth Circuit with her assertion of "pervasive, ongoing noncompliance." The record in fact showed only instances of noncompliance.[5]

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[5] Petitioner's allegation of "eight straight years of District-wide non-compliance" is totally unsupported by the record. (Petition for Certiorari, p. 8). Moreover, Petitioner is misleading in implying that the consultant's report in *Chanda Smith v. Los Angeles Unified School District, et al.*, U.S.D.C. No. CV-93-7044-LEW (C.D.Cal.), addresses the "exact same factual allegations" as the instant case. (Petition for Certiorari, p. 7) Petitioner's allegations address the time period from 1989 to 1991 and deal primarily with the issue of teacher presence at Individual Education Program meetings. The consultants' report, which was issued ***one year after*** the summary judgment motion was

2. The Ninth Circuit correctly stated the FCA's scienter requirement in general and in the context of promissory fraud in particular, but in any event its analysis on this issue is *dicta* and not necessary to its holding.

Petitioner's claim that the Ninth Circuit misstated applicable law on the FCA's scienter requirement is similarly misplaced. Petitioner asserts that the Ninth Circuit erred in its analysis of promissory fraud when it stated that "[f]or a certified statement to be 'false' under the [FCA], it must be an intentional, palpable lie." *Hopper*, 91 F.3d at 1267. Petitioner's argument is misplaced for two reasons. First, the assertion is *dicta* and not necessary to the court's holding. The Ninth Circuit found that the School District's promises of future general compliance were not a prerequisite to the receipt of funds, and thus not " 'the cause of the Government's providing the benefit' [citing John T. Boese, *Civil False Claims and Qui Tam Actions* at 1-29 (1995)]." *Hopper*, 91 F.3d at 1267. Thus even if false, the promises were not actionable under the FCA. Indeed, the United States Attorney General, in its motion to clarify the Ninth Circuit's opinion, noted that the "intentional, palpable lie" language is found in *dicta* and is "in no way necessary to the panel's disposition of the case." (App. 139).

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decided, addresses a broad range of issues pertaining to conditions at the School District as of October 1995. It does not address conditions at the School District during the period of 1989 to 1991. The Ninth Circuit correctly denied Petitioner's request for judicial notice of the *Chanda Smith* consultant's report and consent decree.

Second, Petitioner is wrong in asserting that the Ninth Circuit's *dicta* is in error. The court cited the correct scienter requirement, that there be "knowing fraud." *Hopper*, 91 F.3d at 1268. Moreover, the "intentional, palpable lie" language occurs in the promissory fraud context. While courts have found promissory fraud to be actionable in rare circumstances under the FCA, see *United States v. Shah*, 44 F.3d 285, 290 (5th Cir. 1995), it is hornbook law that for a promise to be actionable, it must have been false when made. See *Hopper*, 91 F.3d at 1267. Were this not the case, every breach of a contract with the United States could be actionable under the FCA.

D. Petitioner Does Not Argue That There Are Compelling Reasons for This Court To Consider Expanding the Reach of the FCA in This Case and There Are Compelling Policy Reasons for This Court To Decline To Do So

Perhaps most importantly, the Ninth Circuit's opinion is in accord with the policy and goals of both the FCA and IDEA. The FCA was intended to address fraudulent claims for governmental funds, not regulatory noncompliance. IDEA, on the other hand, has a comprehensive scheme for regulating compliance with its provisions. Petitioner, however, would have this Court overturn the Ninth Circuit and ignore IDEA to give bounty hunters the ability to use the FCA to police public agency compliance with governmental regulations. Petitioner has pointed to no compelling reasons justifying this unprecedented expansion of the FCA.

Indeed, the circumstances of this case indicate compelling policy reasons for following the plain language of IDEA and the FCA. In this case, the government has suffered no loss, for, as the Ninth Circuit pointed out, the School District not only spent 100% of its IDEA funding on special education, but spent many times more from its own fund for general education. *Hopper*, 91 F.3d at 1268. It would make no sense to divest the School District of hundreds of millions of dollars of badly needed funds and to pay Petitioner twenty-five to thirty percent of these funds pursuant to 31 U.S.C. § 3730(d) solely on account of alleged instances of regulatory noncompliance, particularly where there has been no fraud and where IDEA provides the mechanism for policing compliance.

Similarly, it would make no sense to subject the School District's personnel decisions to review under the FCA when Petitioner has not been able to show any nexus between her acts and fraud or false claims.

CONCLUSION

Petitioner has presented no conflict with the precedents of this Court or with the decisions of any other circuit, and presents no other compelling basis for this Court's review. Her request that this Court consider expanding the scope of the FCA so that bounty hunters may police public agency compliance with federal regulations, even where there is no evidence of fraud, should therefore be denied. In addition, her request that this Court consider expanding the "whistleblower" protection

of the FCA to protect acts having no nexus to the FCA should also be denied.

Respectfully submitted,

BONIFACIO BONNY GARCIA
(Counsel of Record for Respondents)
RAJEEV M. TALWANI
BARBOSA GARCIA & BARNES
500 Citadel Drive
Suite 390
Los Angeles, California 90040
(213) 889-6600
Attorneys for Respondents